

JOHN P. WILEY

IBLA 90-238

Decided June 2, 1993

Appeal from a decision of the Milwaukee District Office, Bureau of Land Management, cancelling private maintenance and care agreements for wild burros and repossessing a wild burro with tattoo mark 524. ES 4700.

Affirmed in part; set aside in part.

1. Wild Free-Roaming Horses and Burros Act

BLM properly cancelled a private maintenance and care agreement for a wild or free-roaming burro upon receiving proof that the animal subject to the agreement was in a deteriorated condition. Evidence offered by the burro's custodian to establish that a genetic defect was the cause of the burro's observed hoof condition was not adequate to overcome contrary medical evidence based on an actual examination of the adopted burro where the evidence of genetic defect offered by the adopter related to other animals not covered by the maintenance agreement.

APPEARANCES: John P. Wiley, O'Fallon, Missouri, pro se; Kristina A. Clark, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

John P. Wiley has appealed from a January 26, 1990, decision of the Acting District Manager, Milwaukee District Office, Bureau of Land Management (BLM), that cancelled his Private Maintenance and Care Agreements (Agreement(s)), Form 4710-9 entered into with BLM on October 10, 1977, and January 15, 1978, for nine wild free-roaming burros. The decision cancelled both Agreements because the deaths of some of the adopted burros had not been reported to BLM, and because it was determined that "you failed to take proper care of burro number 524 by keeping the animals hooves trimmed." The January 1990 decision also directed that "[a]ny requests for additional excess wild horses or burros received from you in the future will be denied." 1/

1/ Wiley has questioned this statement. The regulations in effect at the time of the cancellation of the 1978 Agreement provided that a civil penalty could be imposed for violations of the maintenance regulations or

Both Agreements defined maintenance as "proper care and protection of the animals under humane conditions for their lifetime." Each Agreement provided that it would remain in effect until either the animals died, or BLM or Wiley terminated the agreement. ^{2/} Although the decision here under review gave Wiley's failure to report death as a reason for cancellation of both Agreements, BLM has conceded on appeal that the death by natural causes of those animals was not cause for cancellation of either Agreement, which terminated, as to each animal covered, with the death of the animal. See Para. 2, Terms, Agreement; BLM Answer at 3. The cancellation of the Agreement made on October 10, 1977, must therefore be set aside, since it was based entirely on the fact that Wiley had not reported that the animals adopted by that instrument had all died by 1990, and because there was no requirement that he report the deaths (which are not denied to have been from natural causes) to BLM. Consequently, the only issue before us on review concerns the cancellation of the Agreement of January 15, 1978, and the repossession of Burro number 524 (called "Nitro" by Wiley) by BLM on January 17, 1990.

On January 5, 1990, the St. Charles County Rabies Control Office received a complaint about a dead donkey in a roadside field near Wiley's property. In response to the complaint, on January 9, 1990, County officials conducted a search of Wiley's barns and fields during his absence. The search revealed nine decomposing burro and sheep carcasses near the Wiley pasture and three skeletal remains of unidentified animals. Seven burros and four horses were found in a building and a number of burros, sheep, cattle, and horses were found at pasture on the Wiley farm, together with a number of "farm dogs." All the animals appeared to be healthy, except that it was noted that the hooves of four burros observed in a building on the farm "had abnormal hoof growth of 5-6" making it difficult for them to walk" (Report of Dennis R. Crawford dated Jan. 9, 1990). In a pasture on the Wiley farm, Crawford also reported that he found two other burros who "had abnormal hoof growth of 6-7" and had difficulty in walking." He concluded that the animals hooves had not been cared for in conformity to written standards for "care of horse's feet which also applies to burros." Crawford was accompanied by Elly Kelly, a veterinarian, who

fn. 1 (continued)

for breach of an maintenance agreement. 43 CFR 4770.2 (1989). That penalty could include "disapproval of requests by the adopted [sic] for additional excess wild horses and burros." The record before us does not indicate that Wiley, at the time of the cancellation of his 1978 agreement, had any other request to adopt pending before BLM. It appears that he did not. The language in the opinion purporting to disapprove other applications was therefore unnecessary to the decision and was of no effect.

^{2/} Although the Wild Free-Roaming Horses and Burros Act of 1971 (Act) was amended in 1978 to allow adopters to apply for title to adopted animals after one year of humane care (16 U.S.C. § 1333(c) (1988)), because Wiley did not apply for title to the animals they remained property of the United States. See United States v. Hughes, 626 F.2d 619, 622 (9th Cir. 1980).

examined the six burros described by Crawford's report. She found that they had "evidence of chronic laminitis, resulting in contorted and excessively long hoof growth" (Report of Elly Kelly, D.V.M. dated Jan. 12, 1990). The record is silent concerning whether Nitro was one of the six animals examined and found by Kelly to show signs of "chronic laminitis."

On January 16, 1990, John F. Winnepenninkx from the Milwaukee District Office, BLM, accompanied Crawford to the Wiley property, where Wiley showed him Nitro. Winnepenninkx opined that although the hooves of the animal had been trimmed, "[t]he growth on the burro's hooves was excessive" (Case History Summary dated Jan. 18, 1990). Winnepenninkx stated that he then

told Mr. Wiley that because of the condition of the animal the Bureau of Land Management would take possession of the animal effective at 8 am on January 17, 1990. Mr. Wiley was told that he had the right to appeal the decision and that he would receive the written Letter of Decision in a few days.

On January 17, 1990, the burro was removed from the Wiley residence and transported to the Missouri Humane society's Long Meadow farm near Union, Missouri.

Id. at 2.

Following repossession of the burro Nitro, he was examined by veterinarian Tim Ellis who reported that "he x-rayed the feet on the animal and that the animal was not foundered and the long feet were the result of neglect and nothing else" (Report of telephone conversation dated Mar. 7, 1990). Mark Hemmer, a farrier (blacksmith), was consulted by BLM about the condition of Nitro's hooves. He reported that the "front hooves trimmed to normal but the back suffered some permanent damage as a result of not being trimmed" (Report of telephone conversation dated Mar. 9, 1990).

In response to this evidence, Wiley has offered the analysis of blacksmith Ron Helvey, hired by Wiley in "the middle of January 1990" to trim the hooves of his horses and burros. Helvey reports that since then he has trimmed the hooves of the remaining burros and found that, as to some of them, their hoof deformity is "not a matter of neglect" but that it is "deeper seated" and he suspects that it is a "matter of the animal apparently being born with a problem" (Ron Helvey report dated May 23, 1990). It does not appear that Helvey has ever examined Nitro or trimmed his hooves.

Wiley has also offered the testimony of LeAnne Snider, a police officer who assisted him at his farm before and after January 1990 and who had actual knowledge of his animal husbandry practices prior to January 17, 1990. She reports that she cared for the animals at times when Wiley was absent, that she has assisted Wiley while he trimmed hooves, and that, as of the date of her statement in May 1990, all the hooves of every horse and burro on the farm were properly trimmed. She asserts that reports of overfeeding the animals were unfounded, and that, while they were sometimes

"a little late" in doing hoof-trimming because of the press of other business, none of the animals was ever neglected (Statement of LeAnne Snider, dated May 21, 1990, at 2).

Wiley has also offered a statement from Margaret Gayson, a neighbor, who reports that in 1978 when Wiley first obtained Nitro from BLM that special care was given to "the donkeys * * * [who] had foot problems-- specifically curling toes" (Statement of Margaret Gayson dated May 25, 1990, at 1). Gayson refers to animals obtained from Arizona when there was a "snow storm in January, 1979." This is probably a reference to the shipment that included Nitro, who was obtained by Wiley in January 1978. According to Gayson, she saw Wiley "soaking [the burro's] feet and caring for them."

Wiley argues on appeal that a disagreement about hoof trimming did not justify removal of Nitro from his care. He contends that all his animals, including Nitro, were healthy and properly fed, and explains that the deaths of the animals found by the County rabies officers were caused by unusually cold weather that had, despite his best efforts, been too extreme for some of the weaker animals in his care. He contends that all the animals from his 1977 and 1978 adoptions who died had done so from natural causes. He states he had not been able to dispose of the animal remains reported to have been left in his roadside field in January 1990 because the cold weather had frozen the ground so that burial needed to wait until a thaw. He objects to BLM's entry onto his property without permission and the removal of the animal without first warning him or allowing him to correct the hoof condition complained of by BLM. BLM has answered that Wiley breached his contractual duty to give the burro Nitro humane care by neglecting to properly trim his hooves. It is contended that Wiley was not harmed by lack of prior written notice that the burro would be taken by BLM and that repossession "was justified for the well-being of the burro" (BLM Answer at 8). Before the question whether BLM properly cancelled the 1978 Agreement and repossessed Nitro can be considered, this procedural matter must be addressed.

The decision issued by BLM on January 26, 1990, was the written notice provided for by the Agreement and conformed to the regulations in effect in January 1990. See 43 CFR 4770.3. That the burro was taken back into BLM custody shortly after the condition of his hooves was discovered and before the written decision cancelling the agreement was issued was in conformity to proper procedures established for protection of animals in the wild free-roaming burro program. See Thana Conk, 114 IBLA 263, 272 (1990). Wiley has not shown that his ability to prosecute his appeal and to present evidence concerning his care of the burro was affected by this action in any way. We find that BLM properly took Nitro into custody in January in order to insure that he received proper care when it was discovered that his hooves were in a deteriorated condition. See id. We therefore will consider this appeal on the merits.

[1] The Wild Free-Roaming Horses and Burros Act of 1971, as amended, 16 U.S.C. § 1333(b)(2)(B) (1988), permits placement of burros with qualified applicants who will provide them with humane treatment. "Humane treatment" is defined as "handling compatible with animal husbandry practices accepted in the veterinary community, without causing unnecessary stress or suffering to a * * * burro." 43 CFR 4700.0-5(e) (1989). "Inhumane treatment" provides cause for revocation of a maintenance agreement (see 43 CFR 4770.2(b) and 4770.1(f) (1989). Treatment is "inhumane" if it involves "negligent action or failure to act that causes stress, injury, or undue suffering to a wild * * * burro and is not compatible with animal husbandry practices accepted in the veterinary community." 43 CFR 4770.1(f) (1989).

This Board has upheld cancellation of a maintenance Agreement and repossession of a healthy horse where an adopter breached her Agreement with BLM by improper treatment of another horse subject to the same agreement. Susan Moll, 101 IBLA 45, 50-51 (1988). We have also acknowledged the possibility of cancellation of a maintenance Agreement when there was evidence of mistreatment of animals who were subject to another such Agreement. See Patrick E. Hammond, 60 IBLA 205, 208 n.4 (1981). It is there-fore clear that the circumstances surrounding the care of other animals by an adopter is relevant to an inquiry into whether he or she has conformed to animal husbandry practices accepted by the veterinary community. See 43 CFR 4700.05(f) (1989); Esther E. Lenox, 102 IBLA 224, 228 (1988). Wiley has recognized the relevance of information concerning his animal husbandry practices in general, and on appeal has offered evidence to show that he has properly trimmed the hooves of his remaining burros and horses in support of his argument that Nitro can be safely returned to him and be assured of equally good care as the rest of his stock.

When BLM cancels an Agreement and repossesses animals in private custody under an Agreement, the custodian has the burden of establishing that such action was improper. Mary Magera, supra. In the context of this appeal, Wiley was obliged to show that the condition of Nitro was not attributable to Wiley's failure to conform to ordinary veterinary standards of care for burros at the time the burro was returned to BLM custody.

The record before us indicates that an initial diagnosis of laminitis, made by veterinarian Kelly, was relied upon when Nitro was taken back by BLM on January 17, 1990. Webster's Third New International Dictionary defines laminitis as "inflammation of a lamina, esp. of a horse's foot that is accompanied by heat, pain, and lameness and is caused by overexertion on hard footing or more often is secondary to some other condition (as digestive disturbances due to overeating): * * * founder. See Esther E. Lenox, supra at 225. The meaning of the term "founder" is given by the same dictionary as "laminitis esp. when of digestive origin." The possible diagnosis of laminitis was ruled out for Nitro in March 1990, however, when veterinarian Ellis reported to BLM that an x-ray examination revealed Nitro was "not foundered and the long feet were the result of neglect and nothing else." Thereafter a report from blacksmith Hemmer established that he had trimmed Nitro's hooves for BLM and

that the condition of the hooves was the result of neglect and in his opinion no genetic problem existed. He said that the front hooves trimmed to normal but the back suffered some permanent damage as a result of not being trimmed. I asked him when he thought the feet had been trimmed last. He told me that he couldn't tell for sure but that it had been a long time. I asked him if he thought they had been trimmed last September (as Wiley states in his appeal letter) and he said no. He said that it was a lot longer than that.

(Report of telephone conversation, Mar. 9, 1990). The position of BLM is, therefore, that there was a neglect by Wiley to trim the hooves of Nitro with the frequency required by acceptable animal husbandry practices and that this neglect had caused injury so as to support cancellation of the 1978 Agreement and repossession of the animal.

In his statement of reasons (SOR) Wiley argues that there is no exact standard of care for burro's hooves. He contends

there is no government specification on proper hoof length, they were trimmed several times a year and I have acquiesced on this very subjective point so that it never becomes a question in the future -- I contracted with a professional farrier to do the trimming on a routine basis now, and in the future.

(SOR at 6). Wiley states that several of the burros had "bad feet" when he received them from BLM. Id. at 3. In his Response to BLM, Wiley clarifies his position concerning the condition of Nitro's hooves. He explains that "I have not said that the condition of Nitro's hooves were genetic * * * [r]ather, some of the animals I received from the BLM did in fact have such a problem and the females did in fact produce such foals on occasion" (Response at 2). He then states that:

I don't disagree that the hoof condition is in fact treatable on all but one burro to the degree that "aggressive" trimming much improves their condition. Further, I do not deny that several of the donkeys did in fact need their feet to be trimmed. I will not debate numbers because the degree becomes subjective, depending upon who might be offering opinions. In my opinion, four of my burros did in fact need trimming. I live alone and I have been able to trim the horses and some of the donkeys by myself. In other cases, I have had to wait until I could get help to trim the feet of the others. Because of this and the fact that it's physically demanding, I approached a farrier late last fall to do the work for me. In fact, this was the farrier I subsequently contracted to do all of my animals. I must honestly say that the physical relief has far outweighed the subsequent financial burden, and the professional does a far better job than I can do. I do not believe the condition of Nitro's hooves was either painful or disabling to him and anyone who describes with concern that a

donkey's personality is listless just has not been around donkeys. Donkeys are naturally disinclined to any unnecessary effort and display remarkable little enthusiasm beyond eating and sometimes breeding.

(SOR at 3). He reiterates that he did trim Nitro's hooves in September 1989 as he had previously stated, the opinion of Hemmer to the contrary notwithstanding.

Wiley's assertion that the frequency of trimming and the proper length of hooves are wholly subjective and his tardy assurance that he will properly handle the matter in the future as a result of the cancellation and repossession are insufficient to overcome the evidence of his substandard care submitted by BLM. The decision to retain the burro was supported by the reports of a veterinarian and blacksmith who examined Nitro after he was repossessed. Neither the statement by Wiley nor the supporting statements by the three witnesses offered in support of his position directly contradict the findings made by the veterinarians and blacksmith who reported their findings to BLM. Their reports established a pattern of neglect and consequent physical stress on Nitro that is not rebutted by the assertion that Wiley's inexperience in the care of hooves and the burden of other chores had contributed to the condition of Nitro observed by the veterinarians in January and March 1990. The explanation and evidence he has offered both explain and establish the fact of his neglect. If, as he seems to contend, the observed hoof length of his animals, some of which approached 7 inches in excess length (as described by the Crawford report) was within tolerable limits and consistent with veterinary standards, then he should have offered some evidence to support that conclusion. If the excess length of the hooves of Nitro was within such limits, some proof to establish error in the findings made by the BLM experts should have been introduced. As matters now stand, however, nothing in the record now before us tends to support a practice that would allow lengths of from 5 to 7 inches of excess growth on the hooves of a burro, and the conclusion by Crawford, Kelly, Ellis, and Hemmer that this was an abnormal condition caused by neglect is not rebutted and indeed is uncontradicted. Further, their conclusions concerning the actual condition of Nitro at the times they made their respective examinations is not contradicted by Wiley, although he suggests that his care, although admittedly sporadic, was not neglectful. He has failed to establish, however, that the contrary conclusions concerning Nitro made by the BLM experts were in error in any way.

We therefore conclude that cancellation of the 1977 Agreement is not supported on the record before us and set aside the finding that the 1977 Agreement should be cancelled. As concerns the 1978 Agreement under which Nitro was acquired, however, we find that the record supports a finding that Wiley neglected to properly care for Nitro and permitted the condition of his hooves to deteriorate contrary to animal husbandry practices accepted in the veterinary community. As a consequence, we find that repossession of Nitro was proper under the circumstances shown of record, and we affirm the cancellation of the maintenance agreement under which he was acquired and his repossession by BLM in 1990.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Milwaukee District Office is affirmed in part and set aside in part.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge